**TAY KET @ CHAN KONG SEONG**

**v.**

**BUMIBAKTI DEVELOPMENT SDN. BHD.**

HIGH COURT, KUALA LUMPUR
DATO' WAN ADNAN BIN ISMAIL J.
[CIVIL APPEAL NO. R2-12-146-91]
30 JUNE 1994

***HOUSING DEVELOPERS: Sale and Purchase agreement of house - Plaintiff claiming damages for late delivery of vacant possession - Connection of electricity to housing project - Whether connection to electric sub-station sufficient to discharge Housing Developer's obligations - Item 3 of Third Schedule of Housing Developers (Control and Licensing) Regulations 1982.***

***HOUSING DEVELOPERS: Plaintiff claiming damages for late delivery of vacant possession - Determination on length of delay - Defendant energising electric sub-station - Connection of electricity to plaintiff's house 6 months later - Whether plaintiff deemed to have taken delivery of vacant possession upon energising of sub-station or only upon connection of electricity to house.***

The plaintiff entered into a sale & purchase agreement with the defendant on 4 October 1984 for the purchase of a house. The defendant being a Housing Developer agreed to construct and deliver vacant possession of the property to the plaintiff within 24 months of the Agreement i.e on or before 3 October 1986.

The S & P Agreement contained *inter alia* clauses relating to delivery of vacant possession and payment of connection charges for water, electricity and other amenities.

On 6 February 1987, the defendant paid to LLN (now TNB) the charges required to energise its electric sub-station and on 18 February 1987, electricity was duly connected to the sub-station. On 20 January 1987 the defendant wrote to the plaintiff informing him to take possession of the property within 14 days of date thereof.

The plaintiff could not take possession of the house at the prescribed time as electricity was only connected to the house on 3 September 1987.

The plaintiff applied to the Sessions Court for damages consequent to the late delivery of the property for the period 3 October 1986 to 3 September 1987 and contended that the date of delivery of vacant possession of his house should be the date whereby it was connected with water and electricity. The learned Sessions Court Judge held that the plaintiff was only entitled to damages under the S & P Agreement for the period 3 October 1986 to 18 February 1987 i.e. to the date of connection of electricity to the sub-station.

The plaintiff thus filed an appeal against that decision.

The issue before the High Court was whether delivery of vacant possession was deemed to be given on material date of the sub-station being energised.

Item 3 in the Third Schedule must be read together with the provisions of clauses 15(1) and 19(1) & (2) of the S & P Agreement. The plaintiff was deemed to have taken delivery of vacant possession 14 days after the notice dated 20 January 1987 was given to him.

**Held:**

**[1]** Connection of electricity to the property must necessarily mean only connection of electricity to the defendant's sub-station. The defendant having energised the sub-station on 18 February 1987, has performed his obligation under the sale & purchase agreement and has also complied with Item 3 of the Third Schedule of the Housing Developers (Control of and Licensing) Regulations 1982.

**[2]** Section 39 (1) of the Electricity Act 1949 legally prohibits the defendant from installing meters at the houses within the project, even if the defendant wished to do so. Only the LLN (now TNB) can install the meters and connect electricity to the houses.

*[Plaintiff's appeal dismissed with costs. Decision of lower Court upheld. Plaintiff entitled to damages up to 18 February 1987 only].*

**Case referred to:**

*Syarikat Lean Hup (Liew Brothers) Sdn. Bhd. v. Cheow Chong Thai [1988] 3 MLJ 221* ***(dist)***

**Legislation referred to:**

Electricity Act 1949, s. 39(1)
Housing Developers (Control and Licensing) Regulations 1982
Subordinate Court Rules 1980, O. 26A

*For the plaintiff - Moi Teik Hong; M/s Ho & Fam*
*For the respondent - K.S. Loh; M/s Tay, Tee & Nasir*

**JUDGMENT**

**Wan Adnan bin Ismail J:**
The defendants/respondents are the developer of a housing project known as Taman Melur Phase II. By a sale and purchase agreement dated 4 October 1984 (the said Agreement) made between the plaintiff and the defendants, the defendants agreed to sell and the plaintiff agreed to buy a double-storey link house in the housing project (the said property) for the purchase price of RM99,500.

The said agreement provided *inter-alia*, that the defendants would complete the construction of the said property and deliver vacant possession thereof to the plaintiff within 24 calendar months of the date of the said Agreement namely, on or before the 3 October 1986.

The agreement also provided that should the defendants fail to deliver vacant possession of the said property within the said period liquidated damages at the rate of 10% of p.a. on the purchase price would be payable by the defendants to the plaintiff calculated from day to day from the date of the said period until the date of the actual delivery.

The plaintiff alleged that the defendants effected delivery of vacant possession of the said property only on 3 September 1987 and claimed from the defendants the sum of RM9,159.45 for the delay of 336 days.

By notice of application dated 28 August 1989 the plaintiff made an application to sign final judgment against the defendants for the amount claimed under O. 26A of the Subordinate Court Rules. When the application came up for hearing both counsel agreed to proceed with proper full hearing of the action without calling witnesses and for such purpose agreed to the following facts:

1. Date of sale and purchase agreement is 4 October 1984. Delivery of possession must be on or before 3 October 1986.
2. On 20 January 1987 the defendants wrote a letter to the plaintiff informing plaintiff to take possession of the said property within 14 days from date of the letter. The certificate of practical completion issued by the project architect was attached to the letter.
3. Electricity was connected to the housing project on 18 February 1987 after the defendants had paid the required deposit on 6 February 1987.
4. Water and electricity were supplied to the plaintiff on 3 September 1987.

The learned Sessions Court Judge was requested to determine the length of delay for which the defendants were liable in damages to the plaintiff under the said agreement.

The learned Sessions Court Judge held that the plaintiff was only entitled to damages under the said agreement for the period from 3 October 1986 to 18 February 1987, the date water and electricity were connected to the housing project. Against the decision the plaintiff now appeals.

The said property is one of many houses in the housing project developed by the defendants. By letter dated 20 January 1987 the defendants informed the plaintiff that the certificate of practical completion in respect of the said property had been issued by the project Architect and requested the plaintiff to take delivery of vacant possession within 14 days from date of the letter. The letter was issued pursuant to clause 19(1) of the said agreement. And clause 19(2) provides as follows:

> 19. (2) Upon the expiry of fourteen (14) days from the date of a notice from the vendor requesting the purchaser to take possession of the said property (whether or not the purchaser has actually entered into possession or occupation of the said Property) the purchaser is deemed to have taken delivery of vacant possession.

Therefore the plaintiff was deemed to have taken possession of the said property 14 days after 20 January 1987.

Clause 15(1) of the said agreement provides as follows:

> 15. (1) The vendor shall at its own cost and expense cause to be laid all necessary water, electricity and sewerage mains to serve the said Building and undertakes to apply for at its own cost and expense the connection of the internal water, electricity and sanitary installations of the said Building to the water, electricity and sewerage mains of the appropriate authority.

The defendants carried out their obligations under this section and made the necessary application to the Lembaga Letrik Negara. They paid the necessary fee on 6 February 1987 and on 18 February 1987 electricity was connected

to the mains. The letter dated 8 June 1989 from the LLN (pg. 65 of the record) confirms this. The letter said, "... sila dimaklumkan bahawa tarikh mulatugas pencawang Taman Melur No. 2 adalah 18 Februari 1987." But the electricity was connected to the plaintiff's house only on 3 September 1987.

Connection of water supply to the said property was not made an issue by both Counsel. I therefore assume that water had been duly supplied to the said property.

It is the contention of the appellant/plaintiff that the date of delivery of vacant possession of the houses in the housing project is the date of the connection of water and electricity to each individual house and in the plaintiff's case 3 September 1987. The learned Counsel for the Plaintiff relied on the often-quoted case of *Syarikat Lean Hup (Liew Brothers) Sdn. Bhd. v. Cheow Chong Thai* [1988] 3 MLJ 221 where the learned Judge held that "vacant possession has to include the connection of water and electricity."

Counsel for defendants said that the defendants had done all that they had to do under clause 15(1) of the said agreement. They had applied to the LLN for the connection of electricity to their sub-station. They paid the required fee and the LLN connected electricity to the sub-station on 18 February 1987. As from this date electricity was available for connection to each individual house in the housing project. Therefore item 3 of the Third Schedule of the Housing Developers (Control and Licensing) Regulations 1982 was complied with as soon as the defendants had energised the sub-station to enable electricity to be connected to all the houses in the project.

I find merits in the arguments of the learned Counsel for the defendants. This point was not canvassed in the *Lean Hup's* case mentioned above.

As at 18 February 1987 the defendants had already caused electricity to be connected to the sub-station. As the developer, the defendants had to build the sub-station for the supply of electricity to all the houses in the project. The sub-station had been energised. What was left to be done was for meters to be installed at the houses within the project. This the defendants could not do even if they wanted to. There is a legal prohibition.

Section 39(1) of Electricity Act 1949 provides as follows:

> 39. (1) Subject to such exceptions as may be prescribed, no person other than the Board shall
>
> (a) use, work or operate or permit to be used,worked or operated any installation;or
>
> (b) supply to or for the use of any other person energy from any installation,
>
> except under and in accordance with the terms of a licence expressly authorizing the use or supply, as the case may be.

Only the LLN can install the meters and connect electricity to the houses. In the plaintiff's case they did so only on 3 September 1987 though electricity was available for connection from the sub-section from 18 February 1987. The LLN could have made the connection earlier. In fact as shown in the letter from LLN dated 12 August 1988 they did connect electricity to a few houses in June 1987. It is also shown that one house only got connection on 14 December 1987. The connection of electricity to each and individual house within the housing project was something outside the control of the defendants. This obligation was not contemplated in s. 15(1) of the said agreement.

In my opinion item 3 in the Third Schedule of the said agreement namely:

> 3. On handing over of vacant possession and connection of water and electricity supply to the building.

must be read together with the provisions of clauses 15(1) and 19(1) & (2). Under clause 19(2) the plaintiff was deemed to have taken delivery of vacant possession 14 days after the notice dated 20 January 1987 was given to him. Obligations under clause 15(1) had been performed by the defendants. Connection of electricity to the building must necessarily mean only connection of electricity to the defendant's sub-station, namely 18 February 1987.

In the circumstances the plaintiff is only entitled to damages up to 18 February 1987.

The appeal is dismissed with costs.